



Commission Chair Ann Ravel  
Commissioners Eskovitz, Garrett, Montgomery, and Rotunda  
Fair Political Practices Commission  
428 J Street, Suite 800  
Sacramento, CA 95814

April 2, 2012

Re: Proposed Regulation 18412

Commission Chair Ann Ravel and Commissioners:

I am writing on behalf of Alliance for Justice, a national association of over one hundred organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ is a leading expert on laws of nonprofit advocacy, providing information, resources, and technical assistance that encourage organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

First, I would like to thank the Commission for recognizing the unique problems that nonprofit organizations face in applying the Commission's current regulations, guidance, and advice regarding disclosure of donations that should be classified as "contributions" under the Act's "one bite of the apple" rule, and for attempting to address these problems.

We work with many organizations that represent communities with a stake in shaping the future of California, which is increasingly decided by the voters at the ballot box. Many nonprofits with whom we work struggle to balance their efforts to ensure that community voices are heard during the election season against the need to comply with a complicated regulatory scheme. While an

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organization may engage in a relatively small amount of ballot measure activity, the Act requires many of these organizations to file reports on a 24-hour basis, up to eight campaign reports in a year, and to disclose private information about donors who support an organization, but may not intend to sponsor the organization's ballot measure advocacy.

While we applaud the Commission's efforts to ensure that multi-purpose organizations are not used to hide the true source of campaign funds, we also ask the Commission to recognize that most multi-purpose organizations do not raise money specifically for their ballot measure advocacy, and instead rely upon existing funds in the organization's bank account when making decisions about what ballot measure activities to engage in during an election season. Multi-purpose organizations typically become recipient committees not because they have raised money to support or oppose a measure, but because they take a "second bite at the apple," by donating staff time or resources to a campaign. Many multi-purpose organizations do not have sufficient funds available to make one-time donations that would allow them to simply report as major donors. **It is because many community organizations trying to speak up about ballot measures are under-resourced that they are forced to comply with a regulatory scheme more complicated than the average organization is equipped to handle.** We hope that the Commission will recognize this is unfair.

Given this reality, we encourage the Commission to adopt a regulation that accomplishes the transparency we all agree is necessary, while accommodating the specific concerns of the nonprofit sector. We have attached suggested regulatory language that would accomplish the following:

1. The Commission's draft regulation would apply to only (c)(3)s, (c)(4)s, (c)(5)s and (c)(6)s. By limiting the regulation to these three types of organizations, the Commission is overlooking the more than twenty other types of 501(c) organizations recognized by Congress. Our suggested language would apply to all 501(c) organizations.
2. The Commission's draft regulation does not codify the presumption of when an individual "has reason to know," which has been articulated in the Fishburn Advice Letter, FPPC No. A-06-075. While we disagree with the Commission's reasoning in that letter, if the Commission stands by this presumption, we encourage the Commission to codify this language in the new Regulation 18412 for the sake of providing more clarity. Our attached draft regulatory language attempts to do so.

3. We encourage the Commission to articulate in the regulation criteria or factors for rebutting the “has reason to know” presumption in Regulation 18215(b)(1), as was suggested in *California Pro-Life Council Inv. v. Randolph* (2007) 507 F.3d 1172, 1185. This will permit donors who want to support non-ballot measure or non-candidate efforts of organizations that occasionally work on ballot measure or candidate efforts to feel confident they will not be incorrectly viewed as contributing to ballot measure or candidate efforts. This is especially true in the case of private foundations that are essentially prohibited from supporting ballot measure activities and candidate work. Accordingly, our draft language allows a foundation to rebut the presumption when the foundation has complied with the IRS safe harbors that allow them to support grantees that lobby, without supporting the lobbying itself.

4. With respect to what standard will be used for rebutting the presumption that a donor “has reason to know,” we encourage the Commission to adopt a standard that draws from existing Commission guidance, rather than creating an entirely new standard. Our proposed language borrows the standard for rebutting a presumption from Regulation 18705.2, the conflict of interest regulations.

5. The burden of filing as a recipient committee – including understanding the Act’s complicated filing schedules, having to devote time to learning about campaign finance reporting or paying a treasurer, and preparing for audits by the Franchise Tax Board – places too high a burden on organizations doing only a small amount of political activity, and discourages many nonprofits from exercising First Amendment rights. We urge the Commission to create a clear presumption that donors do not “know or have reason to know” all or part of their payments will be used to make expenditures or contributions if a multi-purpose organization to which they are donating makes only a small amount of contributions or independent expenditures each calendar year. For example, the Commission could adopt a presumption that donors to organizations that make contributions or independent expenditures totaling \$25,000 or less for statewide ballot measures or \$10,000 or less for local ballot measures do not to “know or have reason to know” about the political activities of these organizations – thereby allowing the organizations to file either as major donor or independent expenditure committees, rather than recipient committees. Of course, this presumption would not apply when donors have actual knowledge that an organization will use a donation for political purposes, as in when an organization has raised money to specifically support its ballot measure activity. We have drafted some suggested language for the Commission.

6. While we are pleased the Commission intends to codify the long-standing advice that allows organizations to rely upon non-donor funds, we are concerned about forcing

organizations to segregate this income in a separate bank account. The administrative burden of maintaining separate bank accounts for this money is not necessary to achieve the transparency that the Commission seeks. Moreover, it is not standard operating practice for an organization to segregate this type of money from other funds in the organization's bank account. Given that when an organization generates non-donor funds, it may not know about any future ballot measure activity, let alone the obligation to segregate the funds under the new Regulation 18412, it is unfair to require an organization to segregate funds in this way. Additionally, given that 2012 is an election year and many organizations may have planned their activities for the year in reliance upon past Commission advice, it would be especially harsh to adopt this new standard now. Because organizations already must track non-donor funds for the annual Form 990, the Commission should allow organizations to use reasonable accounting methods to ensure they have sufficient non-donor funds. Our proposed language addresses the Commission's concerns, while also addressing the practicalities of nonprofit financing.

7. We urge the Commission to adopt a regulation that protects individuals who unwittingly become Major Donors under the Act simply because they donate money to a multi-purpose organization. The Commission's draft regulation may chill donations to the nonprofit sector because, as drafted, the Commission can fine nonprofit donors for failure to file, even if they did not have actual knowledge of their obligation to file as a Major Donor. While the Commission regulations assume a donor has knowledge of an organization's campaign activities, the reality is that many donors do not know about political activities that comprise a small portion of an organization's work, so they have no reason to assume they must file as a Major Donor simply because they fund that organization. We support the Commission's inclusion of the language proposed by Diane Fishburn at the December 2011 Commission meeting, which is included in our proposed regulatory language.

Thank you in advance for your thoughtful consideration of our comments on this draft regulation.

Regards,

Melissa Mikesell

Cc John Wallace, Larry Woodlock

1 Adopt 2 Cal. Code Regs. Section 18412 to read:

2 **§18412. Identifying Funding Sources for Contributions and Independent Expenditures**  
3 **Made by Certain Tax Exempt Organizations.**

4 (a) Application. This regulation establishes rules governing organizations that are formed  
5 and operate as tax exempt organizations under Section 501(c) of the Internal Revenue Code, as  
6 well as federal or out-of-state political organizations, which make contributions or independent  
7 expenditures totaling \$1,000 or more from their general treasuries to support or oppose a  
8 candidate or ballot measure in California, and report the sources of the funds used to make those  
9 contributions or independent expenditures as required by Regulation 18215(b)(1).

10 (b) Definitions.

11 (b)(1) A donor “knows” that a payment will be used to make a contribution or an  
12 independent expenditure if a donor makes a payment in response to a message or a solicitation  
13 indicating the organization’s intent to make a contribution or independent expenditure.

14 (b)(2) A donor will be presumed to “have reason to know” a payment may be used to  
15 make a contribution or independent expenditure once the organization uses dues or other receipts  
16 to make contributions or expenditures totaling \$1,000 or more, for the current calendar year and  
17 the next 4 years. This presumption may be rebutted by proof of specific circumstances that  
18 demonstrate the donor did not intend the payment would be used to fund a contribution or  
19 independent expenditure. Examples of specific circumstances that will be considered include, but  
20 are not limited to, circumstances where:

21 (i) the donation was a grant from a public or private foundation that is not earmarked for  
22 lobbying pursuant to Internal Revenue Service regulation 26 CFR § 53.4945-2(a)(6)(i).

1        (ii) the grant or donation earmarked for purposes other than to make contributions or  
2 independent expenditures

3        (iii) the grant or donation was made in response to a solicitation for a project or activity  
4 of the organization which is unrelated to the organization's political activities or ballot measure  
5 work

6        (iv) the timing of the solicitation for the donation would suggest the donor would not  
7 know or have reason to know

8        (b)(3) A donor will be presumed not to "have reason to know" within the meaning of  
9 subdivision (b)(2) of this regulation and 18215(b)(1) if:

10       (i) the organization spends \$10,000 or less in a calendar year making contributions or  
11 independent expenditures in support or opposition to local ballot measures, or \$25,000 or less in  
12 a calendar year making contributions or independent expenditures in support or opposition to  
13 statewide ballot measures.

14       (ii) the organization does not rely upon funds derived from donors when making  
15 contributions or independent expenditures and instead relies upon other income to the  
16 organization (such as sales of goods or services, rental income or investment income). These  
17 funds may either be segregated in a bank account separate from funds provided by its donors or  
18 by using any reasonable accounting method, the organization can demonstrate the organization  
19 had sufficient non- donor funds which were available to make the payment.

20       (iii) Organizations whose donors are presumed not to have reason to know within the  
21 meaning of subdivision (b)(3) will not be recipient committees and will instead file pursuant to  
22 Section 82013(b) or (c).

1       (c) Reporting. An organization that qualifies as a recipient committee under Title 9  
2 (commencing with Section 81000) of the Government Code shall report as a recipient  
3 committee, identifying its contributors as follows:

4       (c)(1) If a donor knows the payment will be used to make a contribution or an  
5 independent expenditure as defined in section (b)(1) of this regulation, the full amount of the  
6 donor's payment shall be disclosed by the organization as a contribution.

7       (c)(2) If a donor has reason to know the payment will be used to make a contribution or  
8 an independent expenditure as defined in subdivision (b)(2) of this regulation, the organization  
9 shall identify and report donors who are presumed to have had "reason to know" that all or part  
10 of their payments would be used to make expenditures or contributions, using a "last in, first out"  
11 accounting method for the appropriate reporting period. The payment shall be apportioned on a  
12 reasonable basis in order to determine the amount of the contribution. An organization shall not  
13 knowingly conceal the name of a donor with the purpose of depriving the public of information  
14 to which it is entitled under the Act.

15       (c)(3) If an organization that makes a contribution or an independent expenditure from  
16 its general treasury must identify additional donors because those described in subdivisions (b)  
17 and (c) of this regulation did not provide the full amount of the contribution or independent  
18 expenditure, the organization shall allocate the remaining balance of the contribution or  
19 independent expenditure to itself.

20       (c)(4) For donations received under subdivision (c)(2) and (c)(3):

21       (i) The date that must be listed for contributions received shall be tied to the date or dates  
22 of the expenditures.

1       (ii) If the employer and occupation information cannot be obtained, the report shall  
2 provide an explanation of the organization's attempts to obtain the information.

3       (iii) If a contributor is identified as providing \$5,000 or more towards the California  
4 expenditures in a calendar year, the organization shall notify the contributor as required by  
5 Section 84105. However, a contributor shall not be found in violation of the reporting  
6 requirements under Gov. section 82013(c) unless the contributor received actual notice of the  
7 requirements from the organization or a filing officer, and did not file any required reports within  
8 90 days of the date of the notice.

9       (d) The organization shall maintain all records necessary to establish its compliance with  
10 subdivisions (b) and (c).

11       (2) An organization that identifies its donors pursuant to this regulation and also  
12 identifies the same donors on a report filed monthly or quarterly with the Federal Election  
13 Commission or any state agency that regulates campaign finance activity shall be in compliance  
14 with this regulation by identifying the federal or state committee name, identification number,  
15 and the web address where the reports may be found, on the campaign schedule which requires  
16 contributor identification.

17  
18 Note: Authority cited: Section 83112, Government Code. Reference: Sections 82015, 82031,  
19 Government Code.